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MICHAEL RODAK, JR.

No. 74-840

In the
Supreme Court of the United States
October Term

GULF OIL CORPORATION,
Petitioner,

v.

W. H. WOOD,
Respondent.

Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PRELIMINARY STATEMENT

Respondent, W. H. Wood, a former Gulf-branded "independent" station dealer, brought suit against Gulf Oil Corporation alleging certain violations of the antitrust laws, including price-fixing, tie-ins, etc. Respondent complained that because he did not satisfactorily comply with the alleged illegal policies and requirements of the Petitioner he was caused to terminate the operation of his service station. At the time the case was set for trial in Pecos, Texas, Honorable Ernest Guinn invited the Petitioner to file a motion for summary judgment so that certain questions could be resolved by the Court of Appeals, pursuant to 28 U.S.C. Sec. 1292(b). After the motion was filed, the Court granted Petitioner a partial summary judgment, on which the appeal

was predicated. Specifically, the trial court's holdings were:

(1) that the Respondent had no right of recovery for the loss of future net profits, loss of good will, or loss in value of equipment sold by Respondent.

(2) that the Respondent may not introduce evidence regarding Petitioner's actions with respect to other Gulf dealers.

(3) that the jury should be instructed that damages found by the jury would be trebled.

These holdings were reversed by the Court of Appeals.

In "Questions Presented," the Petitioner has taken trial court holding (1) and divided it into two questions for purposes of this petition, eliminated any reference to holding (2), and included holding (3). These will be answered in order.

REASONS FOR REFUSING THE WRIT

1. ***The Court of Appeals correctly held that the Respondent has a right of recovery for the loss of future net profits, loss of good will, or loss in value of equipment sold by Respondent.***

The first inquiry is: Do the pleadings, depositions, affidavits, interrogatories and answers, and requests for admissions and answers, on file, raise a fact issue as to whether the conduct of the Petitioner Gulf Oil Corporation was a "proximate cause" (and there may be more than one proximate cause) or a substantial, identifiable cause of the termination of the Respondent as a Gulf station dealer?

The answer is found primarily in the deposition of Mr. W. H. Wood, the Respondent, taken by the Petitioner, Gulf Oil Corporation.

Mr. Wood testified that he had been in the service station business approximately eight years. (Wood Dep. 4) In April 1968, he bought out the Gulf dealer operating the Gulf station at 300 West Wall Street, in the downtown area of Midland, Texas. (Wood Dep. 7)

Mr. Wood encountered no difficulties until Mr. Malmberg (C. B. Malmberg, District Marketing Manager for Gulf Oil Corporation, Lubbock, Texas) took over the district. (Wood Dep. 10) Thereafter, difficulties commenced concerning his practice of posting the driveway price a penny higher than Gulf desired. The Gulf sales representative calling upon Mr. Wood at the time Mr. Malmberg became the District Manager was Mr. Jim Wolford. About Mr. Wolford, Mr. Wood said (page 11, Wood Dep.):

> "Q. All right, so we'll take up after the first three years. Now who was your sales representative then?
>
> A. It was Jim Wolford, he was about — I think he left about June — so for the first six months. And then Jim Barret was for the remaining six months.
>
> Q. Now tell me about the difficulties you had with Mr. Wolford after this first three year period.
>
> A. Well, it was just little things, you know, like the price of my gasoline. I was posting a penny higher, and Gulf was asking me to get my price down a penny.
>
> Q. What did Mr. Wolford say to you about the price of your gasoline?
>
> A. Well, I can't recall the exact conversation, because it was so long ago, but I mean he left no doubt that Gulf wished me — or were wanting me to drop the price of gasoline one cent."

Mr. Wood had more difficulty with Mr. Early Foster, the Gulf "TBA" representative, commencing January 1971 (contemporaneous with Malmberg's arrival on the scene.) Wood Dep. 18) With regard to Mr. Foster, Mr. Wood testified (commencing page 19, line 12, Wood Deposition:

> "Q. All right, sir, now tell me about the first time you had trouble with Mr. Early Foster?
>
> A. Well, I was buying TBA, my filters, from Audley, and he got killed and his wife was—
>
> REPORTER: Who?

A. Audley Downs, he was a distributor, and he was giving me fifteen percent off of suggested — I mean off his price, case lots, and he got killed and his wife was just maintaining the business until she could get out. So I started buying from a parts supply, at the same price that Audley and John Griffen, which is the distributor now, was having to pay for their filters, jobber price.

And Early didn't like that, he thought I should be buying from Gulf. So he came to the station one day, him and John Griffen, and wanted to know if we could go get a cup of coffee. So we was over having a cup of coffee, and he was asking me why I didn't buy them from Gulf or from John, and I told him it would cost me too much money, I was saving about thirty cents a filter.

And he kept on and on, and finally he asked me if I would buy them from Gulf or John Griffen if John would lower the price. Well, I said, yeah, I'll buy them from them, if I can buy them at the same price, I'll buy them through John Griffen.

And he started in on John Griffen then to lower his price to me, so that I could buy filters through Gulf. And John finally agreed to lower them down, I think it average out within about seven cents a filter of what I was paying for them, from this supply house.

And in the course of the conversation — I don't know how it all came up now, it's been so long ago, but anyway Early Foster, when we was coming back to the station, and I was still talking about the filters and everything, and Early Foster said Mr. Malmberg said either you would buy them or you would get out, you would either buy them through Gulf or you would get out of the station, and we'll get somebody that will.

And I asked Early Foster, I said, ' Is that a threat?' And he said, 'No, that's a statement,' And I asked him to put it in writing, and he said, 'I won't do it.' So we

went on in the station then, and then he made the statemen again in front of the mechanic over there.

Q. What is the mechanic's name?

A. Dale Norton.

Q. Dale Norton?

A. Yes, sir.

Q. Where does he live?

A. 402 Sprayberry, I think that is his address.

Q. 402 Sprayberry?

A. Yes, sir.

Q. S-p-r-a-y-b-e-r-r-y?

A. Yes.

Q. And that's in Midland?

A. Yes, sir.

Q. And what was his name again?

A. Dale Norton.

Q. And he made the statement in front of this mechanic their either you would buy Gulf TBA or you would be out of the station, is that what he —

A. Yes, sir, he made it in front of John Griffin over at the Downtowner, that I would either buy it or get out."

Gulf's attorney inquired as to whether Mr. Wood talked to Mr. Malmberg about this, and the following testimony was given (Wood Dep. 22):

"Q. Did you talk to Mr. Malmberg about it?

A. No, sir, Mr. Malmberg wasn't there.

Q. I mean you didn't call him on the telephone or write him a letter and ask him if he said such and such a thing?

A. I didn't care what he said.

Q. Well, you knew Early Foster didn't have the authority to either put you in or take you out of the station, didn't you?

A. I didn't know what authority Early Foster had. He worked for Gulf, he was an employee of Gulf.

Q. Well, you knew he was a TBA representative, didn't you?

A. Yeah, he was a TBA representative.

Q. And you knew that —

A. And if he told me that Mr. Malmberg said I would either buy them or get out, I took it for exactly what he said.

Q. All right, and what did you do about it, anything?

A. I started buying filters from Gulf."

Mr. Wood did, however, have occasion to talk to Mr. Malmberg. At page 25 of his deposition, Mr. Wood testified in response to questions by the Gulf attorney:

"Q. All right, sir. Did you have any conversations or visit with Mr. Malmberg?

A. Yes, sir.

Q. When was the first one?

A. The first one was late afternoon, oh in — well, I'm going to say it was late January or middle of February, or something, when he first came here, he came in by himself one afternoon and introduced himself, and spoke a few minutes and left. I believe he was on his way to Lubbock.

Q. Did he talk about anything, about your prices or TBA or anything?

A. Not at that time, it was just a more or less — well, we were busy, it was the five o'clock rush, and he just introduced himself as to who he was, and that was about it.

Q. When is the next time you saw Mr. Malmberg?

A. It was about a month later when him and John Griffen and Mr. Myers came in.

Q. What took place then?

A. Well, they came in, and I was back in the office back there doing something, I don't recall what I was doing, but anyway they came back there, and Mr. Malmberg looked up there and saw those Goodyear tires, and he said 'I won't be satisfied until them Goodyear tires are out of this station.'

Q. How did you take that?

A. Well, I took it as a threat.

Q. As a threat?

A. Yes, sir, a threat.

Q. Well, what did he threaten you?

A. Well, he's is the man that was in charge of Gulf, as far as I'm concerned, and if he told me he wasn't going to be satisfied with the way I run my business, I couldn't run my business the way I wanted to, I couldn't satisfy him, I took it was a threat.

Q. You took it as a threat when he said he wouldn't be satisfied until those Goodyear tires are out?

A. Yes, sir.

Q. That's the only basis you have for thinking it was a threat?

A. Yes, sir.

Q. Just his statement?

A. Right.

Q. Did he tell you you had to get them out of there?

A. No, I told you what he said.

Q. That's the only thing he said? he didn't threaten—

A. About the tires.

Q. He didn't threateen you or he didn't tell you that you had to get them out?

A. He just made the statement, 'I won't be satisfied until these tires are out of this station.'

Q. Did you say anything to that?

A. No, sir.

Q. Not a word?

A. No, sir.

Q. You just let it drop?

A. I let it drop right there.

Q. All right, did you get rid of the Goodyear tires?

A. Yes, sir."

During this same visit, Mr. Meyers, Mr. Malmberg's assistant, "kept asking" Mr. Wood why he didn't drop the price of gasoline. (Wood Dep. 28) Mr. Wood testified that he didn't feel that he could operate his business on the margin which would result had he done so, which would have been approximately three and one-half cents per gallon. (Wood Dep. 30).

Mr. Wood also was told to change his pricing by Mr. Jim Barrett, sales representative who replaced Mr. Jim Wolford (who stayed only a short time after Mr. Malmberg arrived). Mr. Wood testified, (Dep. page 37):

"Q. Did Gulf's representatives coming out and talking to you about prices that you were posting out there, the prices you were selling gasoline for, did that conver-

sation cause you to lose any volume, or any money, or those conversations rather?

A. Yes, sir, I feel like it did.

Q. All right, you tell me now how it cost you some money?

A. Well, when they just kept on and on — Jim Barrett kept on and on asking me to drop the price, and he kept saying, 'Well, they may not renew your lease, or they may even cancel your lease,' I finally consented to drop my price a penny a gallon, and it did not increase my volume.

Q. Oh, it didn't?

A. No, sir.

Q. Well, tell me how it cost you money.

A. Well, it was a penny a gallon profit, on the — say 18,000, if I pumped 18,000 that month, it would cost me a hundred and eighty dollars.

Q. Well, did you have a sign up there advertising your prices?

A. Yes, sir. That was one of Mr. Malmberg's pet peeves, was that everybody get their price in line and post it on the sidewalk.'

Mr. Wood stated that although he finally acceded to the demands of Gulf and lowered his prices, he did not pick up any volume, and he did not think that the penny differential had anything to do with it whatsoever in the first place. (Wood Dep. 38) He stated that he could charge a penny over what other people were charging and maintain his volume because he had many coming in and filling up and leaving their car at the station, and he accommodated them and gave them service. Therefore, the reduction in his price was only by virtue of the insistence, and

threats, of the Gulf representatives. As Mr. Wood testified, (Dep. 39-40):

"Q. All right, when did you finally agree to lower your price down?

A. When Jim Barrett kept hounding me and threatening me, and force the lease cancellation.

Q. Now wait a minute, you say he threatened you with forced lease cancellation?

A. Yes, sir.

Q. What did he say?

A. He told me that Gulf may not renew my lease and —

Q. Oh, may not renew your lease?

A. — or may even cancel my lease.

Q. He said 'may cancel your lease'?

A. Yes, sir."

The harassment from Barrett forced Mr. Wood into asking that a buyer be obtained for the station, according to testimony appearing at page 45-46:

"Q. All right, sir, so you say that coming out there and the words you used was 'hounding you', you said that —

A. Pardon?

Q. You said that Mr. Barrett 'hounded' you to lower your price?

A. He kept after me and kept after me every few days, and he would come by and see me, saying 'Get your price down', 'Get your price down'. And the last time he came in, I told him, I said, 'Jim, I ain't going to do it, I don't feel like it's necessary with this station. I've had it for three and a half years, and all this time, I've been a penny a gallon above, and by dropping

the price a penny a gallon is not going to increase my volume that much. I just don't believe it will help.' He felt like I didn't know how to run my own business.

Q. Did you decide to give it a try to see?

A. Yeah, after he forced — after he said they might not renew my lease, I did.

Q. Mr. Barrett said they may not renew your lease?

A. He said they may cancel my lease, may not renew it, and may cancel it, if I don't get the price down —

Q. Those are the words he used?

A. Right.

Q. May not renew it and may cancel your lease if you don't get your price down, is that right?

A. It made me mad and I told him to get me a buyer."

However, Mr. Wood immediately reconsidered, according to the following testimony, Dep. p. 49:

"Q. All right, now that's the first time that you ever told any Gulf representative that you were thinking about getting out?

A. Correct.

Q. The *first* time, very first time?

A. And then I reconsidered, I mean I didn't want to get rid of the station, so I said, 'I'll tell you what I'll do, if you will let me go off of twenty-four hours, then I'll drop the price a penny a gallon to get along with Gulf.' "

After this incident, Mr. Wood testified that Gulf, acting through Malmberg and Barrett, came out with a "dish promotion". Mr. Wood stated that he did not want to go along with the dish promotion because it was too expensive on the dealer's part, and that Barrett repeatedly asked

him to take it on. (Wood Dep. 50) Even after he decided to sell, Mr. Barrett tried to get him to take the dish promotion. (Wood Dep. 51)

Sometime in February 1972, Mr. Wood asked Barrett if his lease was going to be renewed (it was scheduled to expire March 31, 1972) and Barrett replied that he did not know but that if the lease was renewed Gulf was going to go up on Mr. Wood's rent "about $175 a month". (Wood Dep. 52) It was after this that Mr. Wood decided that he would sell.

With regard to the harassment that led to the decision to sell, Mr. Wood gave the following testimony commencing at page 59 of his deposition:

> "A. No, sir, I asked for it. The harrassment took place after Mr. Malmberg came to this district; there was no harrassment prior to that with Gulf in any form or fashion.
>
> Q. Did you ever talk to Mr. Malmberg about this harrassment?
>
> A. No, sir.
>
> Q. You never even complained to him about it?
>
> A. I didn't figure my — why should I go complain to him?
>
> Q. Well, did you think that he was responsible for this harrassment?
>
> A. Yes, sir, I did.
>
> Q. And normally if you think somebody is responsible for —
>
> A. But did he think I had enough sense to run my business the way I thought it was best for me.
>
> Q. Just a second, Mr. Wood. Did you think that if somebody was directing harrassment at you should you

talk to them about it, shouldn't you talk to somebady that was —

A. The harrassment always come through the sales rep. It wasn't Mr. Malmberg himself harrassing me, it was always the sales rep, what Mr. Malmberg said, do this, and Mr. Malmberg said do that, don't do this, do that.

Q. You never checked with Mr. Malmberg —

A. That was —

Q. — Excuse me, go ahead.

A. — who was harrassing me, was through the sales rep carrying out his orders, or supposed orders.

Q. And you never did check with Mr. Malmberg to see if he had actually told these sales reps to say these things to you?

A. No, I knew Jim for four years and I figured if he — that he wouldn't have lied to me about something, if he told me, then that's the way it was. He had never lied to me before.

A. So the reason you got out of the station, you just didn't figure that you could run this thing as an independent business man, is that correct?

A. That's one of the reason, and I didn't feel like I was in a position to gamble on them renewing my lease or not renewing my lease, because if they hadn't of renewed my lease, I couldn't have sold my equipment for no where near what I had in it, and I wasn't in no position to take that gamble, or to take that chance."

Mr. Wood testified that the station was a profitable operation in which he made anywhere from $6,000 to $10,000 a year as "station profit" and that the business was such that he did not want to give it up and would have stayed

if he had had any assurance that Gulf would have renewed the lease. As Mr. Wood testified, beginning page 65 of his deposition:

> "Q. And if he had charged a hundred and seventy-five dollars a month more, that still would not have even equalled what you were collecting from the parking?
>
> A. If I knew that Gulf would have renewed my lease I would have went ahead and stayed and paid the hundred and seventy-five dollars a month extra, because the station would have still been worth it."

Therefore, Mr. Wood testified that he made every reasonable effort to try to find out whether his lease would be renewed. (Wood Dep. 65):

> "Q. Well, did you ever try to find out from Mr. Barret after the conversation—
>
> A. Yes, sir, I did.
>
> Q. —you had with him whether they were going to renew it or not?
>
> A. Yes, sir.
>
> Q. How many times did you ask him?
>
> A. I would ask him nearly every time he would come around, and he never would give me a definite answer.
>
> Q. All right, now when was the last time you talked to him about it?
>
> A. It was sometime in February there when I asked him and he told me he didn't know. And I thought, 'well, here it is a little over a month before my lease is to be renewed, and if he don't know, it don't look too dadgummed good."

Mr. Wood's "feeling of insecurity" was added to by the fact that the year before, i.e., in April, 1971, when his lease was renewed, his request for a three to five-year lease was turned down by Gulf, although it had been promised by Jim

Wolford, the former Gulf sales representative. (Wood Dep. 66) In this regard, the following testimony is given at pages 67-68 of Mr. Wood's deposition:

"Q. Well, just a minute, I'm talking about the fact that they didn't give you a three to five year lease, how did that affect your profits?

A. Because I'm not there now and if I had of had a five year lease, I would have been.

Q. Well, did Gulf tell you to get out?

A. No. They didn't give the five year lease though.

Q. No, but did they tell you to get out of the station?

A. No, they didn't tell me to get out. They just made it pretty obvious that I felt like that was what was going to happen, I was going to get thrown out.

Q. Oh, you felt like it, but nobody at Gulf ever told you that they were not going to renew your lease?

A. Not in so many words, they just always said, 'We may not renew your lease,' or 'you may get your lease cancelled.' They never said, 'We are not going to renew your lease.'

Q. So on the basis of that, the fact that they told you that we may or may not renew your lease, and if we do, we are going to raise your rent a hundred and seventy-five dollars, you decided it was time to get out?

A. I decided I wasn't in no position to ride them out."

Mr. Wood's exasperation is summed up when he states, page 70 of his deposition, "That I was tired of fighting Gulf, is the reason I got out." He said that Mr. Barrett was around every week or ten days, wanting him to drop the price of his gasoline (Dep. 70) and after he did so, and found that it didn't increase his volume but simply cost him a substantial part of his profit, he told Mr. Barrett, "Jim, I sure appreciate that good advice about dropping the price of

gasoline," and when Mr. Barrett inquired, "How is that?", Mr. Wood stated, "Well, it just cost me about $200 a month profit", to which Mr. Barrett replied, "Yeah, but at least you didn't get your lease cancelled, did you?"

Sometime in February, according to Mr. Wood, while the dish promotion and the other problems were being discussed, Jim Barrett made the statement to him: "Well, if you don't like it, get out." (Dep. 78-79) Also, Mr. John Griffin, the TBA jobber, reported to him that Meyers, Mr. Malmberg's assistant, had stated that Mr. Wood's taking the TCA but not dropping his price was "just like stealing from Gulf". (Wood Dep. 79)

With regard to the request for a five-year lease, Mr. Wood testified that when he requested it Mr. Meyers, Mr. Malmberg's assistant, told Jim Barrett, and Barrett told Wood, that a five-year lease "was only for deserving dealers." Mr. Wood figured that he had been with Gulf going on four years and that if he wasn't a "deserving dealer", "What did it take to be a deserving dealer?" (Wood Dep. 82)

Mr. Wood made it clear that had it not been for these problems with Gulf, he had no intention of leaving the station Wood Dep. 86-87):

> "A. Well, I figured if I made a profit of six thousand or ten thousand a year — I had no intentions of leaving that station as long as me and Gulf could work together, I would probably have stayed there for — I don't know how old you are — but I would probably have stayed just as long as — I just had no intention of leaving. Subsequently —
>
> Q. How long did you plan to stay there?
>
> A. Just as long as I was able to do the work, do the job.
>
> Q. And that's assuming that Gulf would have continued to lease the station to you?
>
> A. Correct."

In this same vein, Mr. Wood testified (Wood Dep. 88-89):

"Q. And that's what you are suing Gulf for, for all these things you say that Gulf said and did to you?

A. That's right.

Q. You just couldn't continue to operate under these intolerable conditions?

A. It got to where I wasn't operating it, that Gulf was operating it.

Q. Well, now did Gulf set the price out there on your products?

A. It wound up that way.

Q. Well, who put the price out there?

A. Well, I put the price out there, I mean I was the one who went out there and changed the pump. Is that what you mean?

Q. Yes.

A. I changed the pump, but it wasn't because I wanted to."

The Gulf attorney declined to leave this line of questioning, and it led into the following which typifies the relationship between Gulf and the dealer (Wood Dep. 90-93):

"Q. So then you were the one who decided to lower the price a penny?

A. No, sir, I wasn't the one who decided to, that was an alternative; if it had been up to me, I would have left the price of gasoline alone, if I had been able to do what I wanted to.

Q. Well, you had a — still had a lease on the station?

A. Yeah, for three months.

Q. For three more months?

A. Right, up until March 31.

Q. And as far as you knew, there was no reason why they wouldn't renew your lease again?

A. As far as I knew, I didn't think they would renew my lease again.

Q. Did you ever talk to Mr. Malmberg about that?

A. Mr. Malmberg wasn't here, he was in Lubbock.

Q. Well, didn't you write him a letter or did you call him on the telephone?

A. Well, I thought Jim Barrett represented Gulf Oil Company just as much as Mr. Malmberg did.

Q. Well, you knew that Mr. Malmberg was over Mr. Barrett didn't you?

A. Well, if Mr. Malmberg was over Mr. Barrett, then therefore Mr. Barrett ought to be just as responsible as Mr. Malmberg.

Q. Don't you think that you ought to be talking to the head man sometime to try to find out exactly what is going on?

A. What is the sale rep's job?

Q. Well, would you answer my question.

A. He's a go-between between the company and the dealer.

Q. All right, sir, but now had you ever talked to a district manager before about anything?

A. Only when he came to my station. Now Mr. Marwood I did. You could talk to him all day long about anything.

Q. Well, did you ever try to talk to Mr. Malmberg?

A. No, sir, because the only time he ever come in the station he complained about he didn't like my Goodyear tires, he didn't like my oil. He didn't like those Winn products setting out there on the shelf; he said Gulf had the same line.

Q. Well, wasn't he trying to sell you Gulf products?

A. Yeah, he was probably trying to sell me Gulf products.

Q. Well, there wasn't any doubt in your mind that he was trying to sell you Gulf products?

A. What?

Q. There wasn't any doubt in your mind that he was trying to sell you Gulf products, was there?

A. He was trying to tell me I couldn't sell Goodyear tires, is what he was trying to tell me.

Q. He didn't tell you that, did he?

A. Yes, he did, in so many words.

Q. Well, now wait a minute, did he tell you that you couldn't sell Goodyear tires *a not?*

A. In those words?

Q. That's what I'm asking you, you told —

A. He told me he would not be happy until those Goodyear tires was out of the station.

Q. All right, he told you he wouldn't be happy until they were out of the station, he didn't tell you you couldn't sell them?

A. And Gulf tires were in there.

Q. He didn't tell you you couldn't sell Goodyear tires, did he?

A. Well, if I sold Goodyear tires he wasn't going to be happy, and if he wasn't going to be happy, I wasn't going to be there.

Q. How do you know that?

A. Well, that's plain arithmetic.

Q. What do you mean plain arithmetic?

A. It don't take a very smart man to figure that out.

Q. Well, now you are just speculating —

A. No, I'm not speculating, because they had hung that lease over my head too many times.

Q. Well, now how many times did they hang the lease over your head, Mr. Wood?

A. In the number of times in the last six months, I don't know, but it was more than two or three times, I mean there was several times the lease subject was brought up, that it may not be renewed or it may be cancelled.

Q. It may not be renewed or it may be cancelled?

A. Right.

Q. That's the words he used?

A. That's the words he used.

Q. And from that you decided that you could no longer continue —

A. From that I decided I had no choice."

It appears rather obvious from the testimony of Mr. Wood that, as he stated, Gulf made it clear to him that he had to go along with the price-fixing, get rid of competitive products, etc., or lose his lease. Because he had violated the policies in the first place and then was slow to correct the violations, he knew his lease was in jeopardy and he repeatedly asked for assurance that it would be renewed. He received no such assurance. He clearly stated that he would have stayed in the station as long as he had assurance his lease would be continued, but that he could not afford to "ride it out" and take a chance on losing the money that he had invested in the station (by letting the lease expire and being required to vacate). He testified directly and unequivocally that Gulf's actions caused him to terminate his dealership. Clearly, a fact issue is raised by his testimony, and the jury should be allowed to sum up the "plain arithmetic" displayed by the facts.

Other evidence supports the conclusion that Mr. Wood drew, and which the jury is entitled to draw.

Mr. C. B. Malmberg, the Gulf District Manager, gave certain testimonial support to Mr. Wood's contentions. Mr. Malmberg said that he "didn't recall" saying that if Mr. Wood received TCA without dropping his price he was "stealing from Gulf" but did admit that he may have made the statement from time to time as "comment to a retail marketer that if a dealer is not utilizing it, putting it in his pocket" one might "term that as an opinion or whatever word you want to use, stealing or whatever it is, but as far as saying this dealer is stealing, no, be it Brown, or Mr. Wood, or Smith, in Midland or San Angelo or Amarillo, or wherever it is." (Malmberg Dep. 85) He further testified that he told Mr. Wood when he saw competitive merchandise in the Wood station ". . . I notice you have Goodyear tires. I'll be happy someday if we can be better salesmen and sell you Gulf tires. You are an independent businessman, but I'll be happy when I see more Gulf merchandise going through your station." (Malmberg Dep. 90) Later, he repeated that he told Mr. Wood that he would be happy when he saw Gulf tires "in there" (in the station) and "I hoped we could get rid of the Goodyear." (Malmberg Dep. 92) He also admitted that he asked Mr. Barrett to "go down and encourage dealers to show competitive prices that they are posting, by offering them price signs." (Malmberg Dep. 96) However, he denied recalling any discussion about cancelling Mr. Wood's lease. (Malmberg Dep. 99) Mr. Malmberg did admit that he had reviewed the rental records pertaining to Mr. Wood prior to the deposition, and give this testimony about them (p. 102):

> "Q. You didn't look at any other records, than the rent records?
>
> A. That's all I recall.
>
> Q. And you found no request that the rent be increased?
>
> A. I saw no rental analysis in regards to a new lease."

Mr. Malmberg then testified that generally rental increases are based on "market value" but could not state that Mr.

Wood's station facility had increased in market value, then slightly altered his position to give the following testimony: (p. 107)

> "Q. Well, if it didn't have more market value, that wouldn't be one of the things that you considered regarding Mr. Wood when you or Mr. Barrett had said his rent was going to be increased?
>
> A. It was the over-all company policy and practice to up-grade rent; and at that time we were undertaking that practice of upgrading rent.
>
> Q. Gulf was just in general raising rents every place?
>
> A. Well, it was over-all what our practice and policy — in fact I was out here — I have been out here two years, and it's up to me to review over-all what our structure is and to keep them in competition, and in keeping with operating expense and cost of doing business and making money.
>
> Q. Well, then it was all considered strictly from Gulf's standpoint?
>
> A. Well, it's our property and our privilege and our cost of doing business, Mr. Price."

Mr. Malmberg stated that all Gulf's actions with regard to Mr. Wood were in accordance with Gulf's policies. (Malmberg Dep. 128) He also stated that Mr. Wood was an above-average dealer and that they had no complaints insofar as his competency as a dealer, his cleanliness, service to customers, etc. (Malmberg Dep. 129)

Mr. Frank Marwood, who preceded Mr. Malmberg as Gulf District Manager, for the district including Midland, testified that renewals are more or less automatic, that renewal-rental rates are based on volume of gasoline sold during the year,[1] and that a sales representative would know in advance

[1] Mr. Wood's volume did not increase but stayed substantially the same during the year preceding his termination.

whether there was any problem which would affect renewals. Witness the following, Marwood Dep. 37-38:

> "Q. Right. Now, in actuality, so long as the dealer is doing a good job and the relationship is satisfactory, the renewals are more or less automatic, aren't they?
>
> A. That is correct.
>
> Q. And from that standpoint, if any problems had developed during the year, in all probability, Gulf and the dealer would both well be aware of it, wouldn't they?
>
> A. Well, there again, you're asking me to assume a lot, Jack.
>
> Q. Well, I'm just talking about under ordinary situations. They would know if they had problems with each other?
>
> A. Certainly; I think so. And what kind of problems are you talking about?
>
> Q. Any problem that might jeopardize a renewal of a lease.
>
> A. Well, the renewal of the lease, you're referring to at the rental or higher rental or lower rental?
>
> Q. Well, let's just assume it's the same rental, say that the volume stayed about the same and it was going to be renewed at the same rental. There are problems that jeopardize —
>
> A. Well, the sales representative would talk with him. If, for example, his volume had increased, you say, well, 'You assume that,' he would talk with him about the renewal before he made up the deal. Most sales representatives discuss with each dealer the renewal of the sales agreement — of the contract, because lots of times a man might decide that he was going to leave anyway and on what basis it would be."

In the ordinary procedure, Marwood testified the Gulf sales representative just delivered an automatic renewal letter

which was read to the dealer sometime around the annual lease expiration date. (Marwood Dep. 41) He also testified that Gulf invested in stations in substantial amounts (according to examples given, up to $140,000) and the rental charged the dealer "wouldn't pay for that kind of investment." (Marwood Dep. 44) According to Mr. Marwood, the real purpose in making an investment of that type by Gulf Oil Corporation is to get a good location through which to sell Guf products. (Marwood Dep. 45)

Early Foster, the Gulf TBA representative, admitted that Mr. Wood asked him why Gulf did not let the dealers alone. (Foster Dep. 26) He also admitted that he had talked to Wood about the Goodyear tires, that Wood discontinued Goodyear tires and bought Gulf tires from him (Foster) on the day that Foster visited the Wood station. (Foster Dep. 29) He stated that Mr. Wood was doing a good job on TBA. (Foster Dep. 31) He also stated that he advised Mr. Malmberg that Mr. Wood had bought the Gulf tires, (Foster Dep. 32) and he said he was acting consistent with Gulf's policies in dealing with Mr. Wood.

Jim Barrett, the Gulf sales representative, admitted talking to Wood about lowering the price of gasoline at Wood's station. (Barrett Dep. 39) He also said that he told Mr. Wood to put up the price sign if he went down on his price. (Barrett Dep. 42) He said that he was concerned with retail prices because it affects business. (Barrett Dep. 67) He also stated that he had discussed TBA with Wood, and perhaps with Malmberg. (Barrett Dep. 52) He also admitted that Mr. Wood had asked him about the lease renewal, (Barrett Dep. 42), but he did not tell Mr. Wood there was no reason not to renew the lease. (Barrett Dep. 44) He said that he made no recommendation in writing regarding Mr. Wood's lease, although he normally turns in recommendations five to six weeks ahead. (Barrett Dep. 70) He said that ordinarily renewals are not even discussed with the dealer because there is no need to, and that he had no discussions with Wood about the renewal in the previous three years that Mr. Wood had served as a dealer. (Barrett Dep. 82-84) He said that he was carrying out Gulf's policies as learned

in a Gulf school that he attended in Tulsa (Barrett Dep. 71-72-73). Mr. Barrett in effect admitted that he knew it would ruin Mr. Wood's investment in his equipment if he had not been able to pass on the equipment as part of a going business, in the following testimony, Barrett Dep. 90-91:

> "Q. Well, think about it, you take a man in Mr. Wood's position. Now he's not a big investor, yet he had ten thousand dollars of his money tied up, and that's just about his life's savings. Now you have the power to wait until the last minute, I take it, or the last day and decide not renew his lease. You've pretty well ruined that investment for him, haven't you?
>
> A. Well, I have never cancelled a lease so I can't say — can't make a statement to that effect.
>
> Q. Well, you know what kind of equipment and so forth Mr. Wood had in his station?
>
> A. Right.
>
> Q. And you know that he's not going to be able to peddle that very much separate and apart from the service station business, you know that, don't you?
>
> A. Possibly.
>
> Q. So unless he's able to pass on as part of the service station business, it's going to ruin his investment in it, isn't it?
>
> A. Possibly."

There are two provisions of the standard lease agreement between Gulf and a dealer which are worthy of note. These are discussed in "Marketing Ground Rules" of Gulf Oil Corporation which appear in the Record at page 26 attached to Answers to Interrogatories. Paragraphs (11) and (12), pages 19-20 of the Marketing Ground Rules provide:

> "(11) in the event of re-entry by Gulf after termination of the lease, Gulf has the right to 'buy or sell or store for the account of lessee, any personal property

and stock of lessee then on said premises and lessee hereby appoints lessor his agent for such purpose * * *" This right of Gulf should be exercised in recognition that we will be dealing with the property of another. If the dealer so desires, he should be permitted a reasonable time to remove his property before this right is exercised; and

(12) strictly speaking, Gulf has no legal obligations to renew an expired lease on its property. However, a refusal to renew because of the failure of the dealer to comply with programs illegal under the antitrust laws (such as resale price maintenance, exclusive dealing, tie-in-sales, etc.), can result in actionable damage to the dealer."

Thus it is clear that Gulf was well aware that if it flatly stated to Mr. Wood that his lease was cancelled, as Gulf obviously desired, "actionable damage" would be caused Mr. Wood. Therefore, Gulf chose to do indirectly what it could not do directly, i.e., to force the termination through the imminent threat of causing Mr. Wood to lose his investment in equipment, a reality which Mr. Wood could avoid only by transferring the equipment as part of a going, existing business operation, thereby preventing Gulf from re-entering and either storing or selling the equipment for him.

Other witnesses who have testified by deposition lend even further credence to Mr. Wood's testimony. The affidavit of John Griffin appears at R. 47. Mr. Griffin stated that he became distributor for Gulf TBA in July 1970. After Mr. Malmberg replaced Mr. Marwood as District Manager, the TBA representative, Early Foster, became more demanding. He stated that if Mr. Griffin did not get the job done that Gulf wanted done, Gulf would get someone who would. He stated that Mr. Griffin could be replaced "like the rest of them." Wolford, the sales representative of Gulf, told Mr. Griffin that Malmberg had been sent in to "shape up" the Midland area. Mr. Griffiin visted Wood's station in the company of Early Foster sometime during the first quarter

of 1971. Prior to this visit, Foster had expressed dissatisfaction with the fact that Wood was buying non-Gulf products. During the visit to Wood's station, Foster, Griffin and Wood went "to coffee". A heated discussion ensued during the coffee break in which Early Foster told Mr. Wood that if he (Mr. Wood) did not buy Gulf products, "we will put some one in the station who will." Wood asked if this was a threat and Foster replied, "Take it anyway you want it." After this meeting, Mr. Wood agreed to purchase filters from the TBA jobber, Mr. Griffin, although he was losing money doing so.

Barrett, the Gulf sales representative, told Griffin in connection with a TBA advertising or promotion program, that if Mr. Griffin did not want to participate, he was expendable "like all the others". Mr. Griffin states in his affidavit that he has made trips with Mr. Malmberg and Mr. Meyers and/or Mr. Barrett going around to different stations, and that he has heard Malmberg give instructions to make certain stations "get back in line," make them "get foreign oil out", and similar statements. He also heard Mr. Malmberg instruct Mr. Meyers and Mr. Barrett to make sure that the dealers got driveway price signs posted. Mr. Meyers particularly did not like any station handling "STP" (competitive oil and gas additive).

Mr. Griffin heard Mr. Malmberg say, at Mr. Wood's station, that he (Mr. Malmberg) "wouldn't be satisfied until those (Goodyear tires) were out." Mr. Griffin has also heard Mr. Malmberg make statements to the effect that dealers who take temporary competitive allowance without lowering their price as Gulf wanted them to were "stealing" from Gulf. Mr. Griffin also heard Mr. Malmberg say that there would be no trouble renting Mr. Wood's station.

Mr. Griffin and Mr. Barrett held a conversation in the latter part of 1971 in which there was speculation about whether or not Mr. Malmberg would actually "check out" Mr. Wood, i.e., terminate his lease agreement or not renew it, and thereby terminate him as a dealer, since Mr. Wood

was known to be a particularly good dealer. Mr. Barrett said that Mr. Malmberg would check Mr. Wood out even though he was a good dealer.

The affidavit of Dale Norton appears at R. 50. According to the affidavit, Mr. Dale Norton works as a mechanic at the Gulf station at Marienfeld and Wall Street, Midland, Texas, and has done so continuously since it was operated by Mr. Audley Downs, prior to the time Mr. Bill Wood commenced operating the station approximately April 1968.

Norton states in the affidavit that sometime early 1971 he heard Mr. Early Foster, Jr., the Gulf TBA representative, make a statement to Wood that he (Mr. Wood) "had to buy Gulf" products. Later, and still during the early part of '71, he heard Mr. Malmberg make certain statements on a visit to the station. According to Mr. Norton, Malmberg first looked across at the Conoco station on the other side of the street and saw an "STP" sign, and said that he did not think any major oil company station ought to be handling STP. At this time Mr. Wood's station was handling STP. Later during the same visit, Malmberg walked into the back of Wood's station and saw Goodyear tires. Malmberg stated that he would "not be satisfied" until the Goodyear tires were out of the station. He then saw some oil from manufacturers or distributors other than Gulf and made the statement, "and look at the 'foreign' oil". According to Mr. Norton, Malmberg made these statements as a command, Malmberg was upset and appeared to be very mad about it and was insistent.

Before 1971, Wood had bought certain products where he could get the best price, particularly oil filters. After the conversation with Early Foster in which Foster said Wood had to "buy Gulf", Wood commenced purchasing filters from Gulf's representatives, although they could be purchased cheaper elsewhere.

Mr. Norton further states that later during the year 1971 he overheard Jim Barrett, the sales representative for Gulf Oil Corporation, discussing Mr. Wood's lease and at the same

time discussing the price that Mr. Wood was posting on the pumps. According to Mr. Norton, Mr. Barrett told Mr. Wood that he "had to get his price down". Mr. Wood had been posting approximately one cent higher than other Gulf dealers. Mr. Barrett told Mr. Wood that this was "considered at the time of lease renewal."

Mr. Norton also heard Mr. Barrett say to Mr. Wood that Mr. Wood's lease might be cancelled.

Mr. Norton says that during the last two months before Mr. Wood left the station, approximately during the first part of 1972, he (Norton) discussed with Mr. Wood from time to time the fact that Mr. Wood had not been able to obtain assurance that his lease would be renewed, and that, as Mr. Norton had overheard Barrett say, "his lease might be terminated or cancelled." From Mr. Norton's observation, Mr. Wood became nervous and was upset because of what he was going through concerning the lease renewal. He had formerly been a cheerful person, and a hardworker dedicated to the station, but according to Mr. Norton's observation this changed considerably because of the problems he was having with Gulf.

It is apparent from the foregoing that the actions of Gulf constituted a "proximate cause" or a "substantial identifiable cause" of the termination of Mr. Wood as a dealer.

The Trial Court ruled that Mr. Wood is not entitled to recovery of any future net profits or loss in value of equipment. This is at odds with the testimony relating to the cause of the termination of the dealership. After the encounters, difficulties and threats of cancellation or nonrenewal of Mr. Wood's lease, (which extended over a period of approximately one year) Mr. Wood understandably was concerned about whether his lease would be renewed on April 1st, 1972. On numerous occasions he requested, through Mr. Barrett, that Gulf advise him whether the lease would be renewed. Gulf never gave a definite answer (Wood Dep. 65; this is not disputed by Gulf). Barrett indicated that though he did not know whether the lease would be re-

newed, if it was renewed it would be at increased rent. Wood was willing to pay increased rent, assuming it was not prohibitive, but he was never told that he would be allowed to continue even at an increased rent. Despite the fact that the leases are generally thought of as being in the "evergreen" category, i.e., automatically renewed each year as long as the dealer satisfactorily performs, Wood was never told that his lease would be renewed by Gulf (Pretrial Order — Stipulation; Wood Dep. 56).

According to the testimony of the Gulf representatives, the most important factor in considering whether to renew a lease is the performance of the dealer, i.e., his past sales volume. If a dealer's performance has been satisfactory, he could expect his lease to be renewed more or less automatically (Marwood Dep. 39). Wood was characterized as a good dealer by both Marwood and Malmberg. It was generally Gulf's policy to notify a dealer whether his lease would be renewed at least thirty days in advance of the expiration of the lease. Under Gulf policies, the dealer could assume he would be renewed if he wasn't notified within at least thirty days. And if there had been any problems affecting lease renewal both Gulf and the dealer would be aware of it (Marwood Dep. 37-38).

It is an obvious conclusion, therefore, that Mr. Barrett knew, when he was being pressured for an answer, whether Mr. Wood's lease would be renewed, but he gave Wood no assurance, one way or the other, and left him "hanging". (Barrett admitted that he never told Mr. Wood whether his lease would be renewed.) In view of the past difficulties, and in view of the illegal demands that had been made upon him (preventing him from running his business as an independent dealer) and the threats of lease cancellation, Mr. Wood was placed in an untenable position. As he testified, he had "no choice" but to attempt to sell his station before the termination date. If he had not done so, his loss on tools and equipment would have been much greater, for he would have been required to sell them separately rather than as part of the going station business. Gulf recognized this fact, and it is remarkable that, after all the discussions about lease renewal

between Wood and Gulf, when Mr. Wood advised, a short time prior to lease expiration, that he desired to sell the business and get out of the station, he was not even then told that if he chose to remain his lease would be renewed — despite the fact that he was admittedly a good and successful dealer.

Translated into terms of an issue for the jury, the question is whether the actions of Gulf designed to secure adherence to practices proscribed by the antitrust laws (price-fixing and TBA tie-in or exclusive dealing) proximately caused, or were a substantial and identifiable cause of the termination of the dealership. To frame the question in layman's terms: Was Mr. Wood harassed or coerced into surrendering or abandoning the station by actions of the Gulf representatives taken because of Mr. Wood's resistance to Gulf's demands regarding pricing and TBA sales?

Clearly, if the evidence supports an affirmative answer, Mr. Wood is entitled to recover damages for loss or destruction of business, including loss of future profits and diminished value of tangible personal property. The evidence obviously raises a fact issue on the point, and it is for a jury to determine whether Mr. Wood's termination was brought about by the actions of Gulf, or produced by other causes, or without cause.

Gulf argues, and the trial court agreed, that all possibility of a fact question is eliminated because Wood "voluntarily" sold his station before he was told by Gulf that his lease would be cancelled or woud not be renewed. This is essentially the same contention advanced by Gulf in the case of *Lehrman v. Gulf Oil Corporation*, 464 F. 2d 26 (5th Cir. 1972, cert, den.) wherein Gulf argued that Lehrman voluntarily left his station and surrendered his lease and therefore could not recover future profits. This court rejected the contention stating:

> "Gulf * * * objects to the use of future profits as a measure of Lehrman's damages because, it contends that allowing Lehrman to recover for future profits would enable a proprietor who has been the victim of a single

anti-competitive practice to walk away from his business and collect damages for future profits despite the possibility that the business might still be operated successfully.

"We do not accept Gulf's restrictive application of the principle of future profits as antitrust damages. When a practice condemned by the Sherman Act puts a small operator out of business, *we do not think it matters whether the antitrust violator directly closes down the small proprietor or whether he takes anti-competitive steps which foreseeably will result in the proprietor's demise if carried on for a sufficient amount of time.*" (Emphasis supplied.)

This Court has recognized, therefore, that a direct dealer cancellation, such as was involved in *Lessig v. Tidewater Oil Company*, 327 F. 2d 459 (9th Cir. 1964) is not necessary to bring about business termination justifying recovery of future profits, diminished value of equipment, etc. Though the facts of the *Lehrman* case and the Wood case are not exactly the same, they closely parallel. In Lehrman, because Lehrman "broke the line" on pricing, he was punished by Gulf, who took his "TCA" away, and forced him to post prices which were non-competitive to those being posted a short distance away. Lehrman was allowed to "die on the vine". Mr. Lehrman surrendered his station and sold his equipment after a period of continued unprofitable operation.

In this case, Mr. Wood went through a year of demands, threats and forced compliance. His final capitulation did not come until near the end of 1971. Because he had resisted Gulf's pressure tactics, he was extremely concerned about lease renewal, and repeatedly asked to be advised. Gulf well knew the basis for his concern, and obviously could have advised him of its intentions, but it refused to do so. Mr. Wood was threatened with loss of the value of his equipment if he had continued to expiration of the lease and was not able to sell it as part of the "going business," a fact well recognized by Gulf representatives. The economic loss to Mr. Wood was thus more imminent than the "creeping"

economic death experienced by Mr. Lehrman, but the alternatives were the same to both of them. They had "no choice" but to get out of the stations, and they were placed in their respective positions by the actions of Gulf Oil Corporation.

Certainly, in pursuing the course it took in this case, Gulf was not unmindful of the teachings of *Lessig* and *Lehrman*. Just as Gulf abandoned the "form of the consignment device after the decision in *Simpson v. Union Oil Corporation*, 377 U.S. 13 (1964)," but continued accomplishing the same end result through other devices, it now attempts to do indirectly (by actions which leave the dealer no choice but to terminate) that which it cannot do directly (by lease cancellation). A fact issue has been raised and the jury should be allowed to decide whether the actions of Gulf forced the termination of the Wood dealership, and, if so, the amount of his damages, including loss of future profits and diminished, unrecovered value of equipment.

2. *Respondent did not receive the "fair market value" of his service station when it was sold.*

This point by Petitioner is so totally without merit, and the opinion of the lower court so conclusively demonstrates its lack of merit, that the pertinent portion of the lower opinion is quoted:

[5] We agree with the fundamental point that a plaintiff cannot recover in an anti-trust suit both the difference between the fair market value and the price received at the time of the sale, and the loss of future profits. *Albrecht v. Herald Co.*, 452 F. 2d 124 (8th Cir. 1971), mandamus denied, 405 U. S. 1063, 92 S. Ct. 1493, 31 L. Ed. 2d 810 (1972); Treble Damages, 80 Harv. L. Rev. at 1566, 1577-86 (1967). In *Albrecht*, the plaintiff was forced to sell his paper route at less than fair market value because of the defendant's anti-trust violations. The damage award fell into three categories and was similar to the request in this case:

> "(1) Plaintiff's damage prior to sale, consisting of profits lost in the operation of the business by reason of Globe-Democrats competition;
>
> "(2) The difference between the fair market value of plaintiff's business (with all of his customers in-

tact) at the time of the sale and the actual sale price received; and,

"(3) Loss of future profits following the forced sale."

Albrecht v. Herald Co., supra, 452 F. 2d 126.

The court there thoroughly reviewed the precedents and held item three inapplicable as unjustly allowing double recovery. The court reasoned:

> "It is our opinion that the plaintiff had received all permissible damages under items one and two, damages occasioned prior to the sale and the full market value on the sale of his route as a going concern, free of the restrictive practices. This value is figured on the basis of his reconstituted route with all 1200 customers. Fair market value would be that price a willing seller could secure from a willing buyer, and the evidence establishes $24,000 as the maximum price attainable * * * The prospect of future earnings is considered in arriving at the fair market value of a given business. Here, undoubtedly the value of the route rested not in its tangible assets of an old truck and paper wrapper (valued $600), but in the exclusive contract of distribution of a well regarded newspaper in a given area. Whatever that fair market value might be, plaintiff had received it. Capitalizing and discounting future profits is one method of figuring present value, but this does not mean that a person is entitled to present value plus future profits." *Id* at 131.

Similarly in the instant case, if there had been no disputed fact concerning whether appellant received the fair market value of his service station, then the partial summary judgment would have been properly granted. The record and briefs reflect, however, that there is grave doubt whether appellant knowingly admitted receiving a fair market value. For instance, the testimony in appellant's deposition indicates that he did not know what "good will" was, so that it is improbable that any admission of receipt of a fair market value took into consideration value for good

will.[10] Therefore on both the issue of liability and damages,[11] there are disputed issues of material fact which make summary judgment improper.

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[10] The dialogue in appellant's deposition states:

"Q. So you decided then to get out?

A. Correct.

Q. And you made a deal with your brother?

A. Right.

Q. Did your brother buy all your stock and equipment from you?

A. Yes, sir.

Q. Did he pay you a fair price for it?

A. Yes, sir.

Q. You don't have any complaint about the price you got for your stock and equipment?

A. No, sir.

Q. You realized full value for your stock and equipment?

A. Yes, sir, by selling it.

Q. By selling it?

A. Yes, sir.

Q. You didn't lose any money by selling your stock and equipment to your brother?

A. No, sir.

Q. Gulf didn't have anything to do with it, you all made the trade by yourself?

A. No, we didn't make a trade, I offered it to him at a certain price, and he accepted it, and we —

Q. Well, you made a trade, you said, 'all right, I'll sell it at this price,' and he said, 'O.K., I'll buy it from you.'?

[11] Of course in determining the fair market value, whether by capitalizing and discounting future profits or estimating loss of good will and the value of the service station equipment, the $10,000 received will necessarily have to be set off.

3. The Court of Appeals did not err in ruling that the jury should not be instructed that damages found by the jury will be trebled.

Until recently there has been a "dearth" of authority on this point, and the authority that existed was divided. To date, no reversible error has been found in a trial court's instruction that any awarded damages will be trebled or that attorney's fees may also be recovered; nor for the trial court's refusal to do so. It has been argued that "it is unreasonable to assume that they (the jury) will not learn of it anyway during the trial." 80 *Harvard Law Review* 1566, 1569, Note 20, (1967). Submission has been favored by Judge Wizanski and has received the imprimature of Devitt and Blackmar, *Federal Jury Practice and Instructions*, Sec. 85.28 (1970). But in *Webster Motor Car Company v. Packard Motor Car Company*, 135 F. Supp. 4 (D.D.C. 1955) Judge Holtzhoff rejected such instructions stating that there was no reason for informing the jury that whatever damages they would allow would be trebled, because this is a matter solely for the court. *Sablosky v. Paramount Film Distributing Corporation*, 137 F. Supp. 929 (E. D. Pa. 1955) is to the same effect.

More definitive reasoning began to emerge with the case of *Semke v. Enid Automobile Dealers Association*, 456 F. 2d 1361 (1972) wherein the Tenth Circuit directly held that it was error for the trial court to reveal to the jury that its award would be trebled.

The court stated, at page 1370:

> "The purpose of the trebling provision is to encourage enforcement of the antitrust laws, and the treble damage thus serves as an incentive. See *Kinnear-Weed Corp. v. Humble Oil & Ref. Co.*, 214 F. 2d 891 (5th Cir. 1954). It also constitutes a penalty for violation and thus serves as a deterrence.
>
> "The consequence of advising the jury of this can only be that the jury will adjust its award accordingly. But in an antitrust case it is not for the jury to fix the

> amount of the judgment. Its function is completed once it determines the amount of *damages*. As we view it, therefore, it serves no useful function to communicate this information to the jury and it is potentially harmful and hence this action of the trial court was error."

The court then noted that if judgment were to be affirmed, the error might be considered harmless since there existed little room in the evidence under the trial court's instruction to award *any* damages. However, in view of the fact that the court remanded for limited retrial, the court considered that it must "notice the ruling so that it can be avoided on retrial."

This opinion is directly on point, and should control disposition of this issue. The principal advanced in *Semke* was reaffirmed in the case of *Standard Industries v. Mobil Oil*, 475 F. 2d 220.

It is apparent that the treble damage instruction is particularly harmful where the damages are relatively small. Without question, the instruction tends to inhibit the amount of the jury award. If the jury knows that any amount it awards will be multiplied by three, it would be less than human if it did not make the mathematical computation to determine the amount that the "plaintiff will get", which leads to inevitable reduction by two-thirds of the amount to be awarded the Plaintiff, in order that the Plaintiff will ultimately obtain judgment for the amount the jury thinks he should receive. This defeats the very purpose of the inclusion of the treble damage provision. It should not be allowed. The Fifth Circuit, like the Tenth Circuit, has recognized this not only in the present case, but also in the case of *Pollock & Riley, Inc. v. Pearl Brewing Company*, 498 F. 2d 1240 (5th Cir. 1974) (with which this case was consolidated for argument in the lower court). It clearly represents the correct position.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was mailed to opposing counsel of record this day of , 1975, by U. S. Mail, certified, postage prepaid and properly addressed.

Jack N. Price
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